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The Constitutionality of Bankruptcy Courts Under the Bankruptcy Reform Act Of 1978 [Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)]

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COMMENT

THE CONSTITUTIONALITY OF BANKRUPTCY COURTS UNDER THE BANKRUPTCY REFORM ACT OF 1978

[*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,
458 U.S. 50 (1982)]

The United States Supreme Court decision that the jurisdiction granted bankruptcy courts by the Bankruptcy Reform Act of 1978 impermissibly infringed on Article III power of the judiciary not only left bankrupts and those who dealt with bankrupts in a quandry, but shook accepted perceptions about the authority of legislative, administrative, and adjunctive courts. This Comment dissects the Marathon decision and identifies the unanswered questions it poses.

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I. INTRODUCTION

When Congress passed the Bankruptcy Reform Act of 1978¹ it vested broad powers² in newly created bankruptcy judges,³ but failed to pro-

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (hereinafter cited as the Reform Act).

2. See Reform Act § 241(a), 28 U.S.C. § 1471 (1982), § 250 (1), 28 U.S.C. § 2256 (1982), § 101, 11 U.S.C. § 105(a) (1982).

3. Reform Act § 201(1), 28 U.S.C. § 151 (1982).

vide the bankruptcy judges with the protections of life tenure⁴ and a guaranteed salary.⁵ In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁶ the United States Supreme Court struck down the Reform Act's broad grant of jurisdiction to bankruptcy judges as a violation of Article III of the Constitution.⁷ The *Marathon* opinion sheds new light and raises new and complex questions regarding the issues of federalism⁸ and separation of powers.⁹

On October 1, 1978,¹⁰ the Reform Act replaced the Bankruptcy Act of 1898.¹¹ The purpose of the Reform Act was to modernize the bankruptcy laws.¹² In contrast to the 1898 Act,¹³ the Reform Act eliminated

4. Reform Act, § 201(a), 28 U.S.C. § 153 (1982).

5. Reform Act, § 201(a), 28 U.S.C. § 154 (1982).

6. 458 U.S. 50 (1982).

7. *Id.* at 87.

8. The principle of federalism requires that the federal government avoid undue interference with the states. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (struck down 1974 amendments to Fair Labor Standards Act extending minimum wage and hour requirements to states and their political subdivisions); Fry v. United States, 421 U.S. 542, 547 n.7 (1975) ("Congress may not exercise power in a fashion that impairs the states' integrity or their ability to function effectively in a federal system").

9. The concept of separation of powers involves the division of functions among the executive, legislative, and judicial departments of the federal government. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 126-127 (1978); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-3 (1978) ("The Link Between Separation-of-Power Considerations and Controversies Over Federal-State Division").

10. Reform Act, Pub. L. No. 95-598, § 402(a), 92 Stat. 2549, 2682 (Act of Repeal). The Reform Act provided for a transition period before the new provisions were to take full effect on April 1, 1984. Reform Act § 402(b), 92 Stat. at 2682. During the transition period, previously existing bankruptcy courts were to continue in existence. Reform Act § 404(a), 92 Stat. at 2683. Incumbent bankruptcy referees were designated to serve as bankruptcy judges until March 31, 1984, or until their successors took office. Reform Act § 404(a), 92 Stat. at 2683. During the transition period, bankruptcy courts, as defined in Reform Act § 404(a) 92 Stat. at 2682, were empowered to exercise all the jurisdiction conferred by § 1471 on the district courts, although that provision was not to become formally effective until 1984. Reform Act § 405, 92 Stat. at 2685. The procedure for taking appeals from the decisions of bankruptcy judges during the transition period was essentially the same as the procedure that would have taken effect in 1984. Reform Act § 405(c), 92 Stat. at 2685; *see infra* note 126.

11. Act of July 1, 1898, ch. 541, 30 Stat. 544 [hereinafter cited as the 1898 Act]. The last comprehensive reform of the federal bankruptcy system prior to the Reform Act was the Chandler Act, ch. 575, 52 Stat. 840 (1938).

12. S. Rep. No. 95-989, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787; H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963.

13. Under the 1898 Act, federal district courts served as bankruptcy courts. *See* 11 U.S.C. 1(10) (1976). Proceedings in bankruptcy cases generally were held before bankruptcy referees, appointed by the district court, unless the district court elected to withdraw the case from the referee. 11 U.S.C. app. Bankr. R. 102 (1976). The judgment of the referee could be appealed to the district court within ten days. 11 U.S.C. app. Bankr. R. 801-803 (1976). Under the 1898 Act, bankruptcy courts were vested with summary jurisdiction, which extended to controversies involving property in the actual and con-

the referee system and created bankruptcy courts as separate courts of record and as "adjuncts"¹⁴ to the district courts of the United States.¹⁵ The Reform Act provided that bankruptcy judges be appointed by the president, with advice and consent of the Senate, for fourteen year terms¹⁶ and be subject to salary diminution¹⁷ under the Federal Salary Act.¹⁸ The Reform Act granted jurisdiction over bankruptcy matters to the United States district courts and then assigned such jurisdiction exclusively to the bankruptcy courts.¹⁹ The Reform Act granted bankruptcy courts much greater jurisdiction than that exercised by referees under the 1898 Act.²⁰ Finally, the Reform Act granted to bankruptcy courts all the power of courts of equity, law, and admiralty,²¹ including the power to try jury cases²² and to issue Writs of Habeas Corpus,²³ con-

structive possession of the court, such as property in possession of the bankrupt at the time of the proceedings. The bankruptcy courts did not have plenary jurisdiction, however, over disputes involving property in possession of a third person, except by consent. *See generally* H.R. Doc. No. 93-137 (Pt. I), 93d Cong., 1st Sess. (1973) (report of congressionally created Commission on Bankruptcy Laws of the United States, created in 1970 to study and recommend changes in federal bankruptcy law); 2A COLLIER ON BANKRUPTCY, (MB) ¶ 38.09 [2], at 1435 (14th ed. 1978).

14. As referred to in this Comment, an adjunct is a hearing officer acting as an assistant to the federal district court. *See, e.g.*, Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979) (codified at 28 U.S.C. §§ 631, 633, 636; 18 U.S.C. § 3401 (Supp. 1980)); FED. R. CIV. P. 53 (1982) (regarding appointments and powers of special masters). In certain cases administrative agencies may function as adjuncts. *See infra* notes 130-35 and accompanying text (discussion of *Crowell v. Benson*, 285 U.S. 22 (1932)).

15. Reform Act, § 201(a), 28 U.S.C. § 151 (1982).

16. Reform Act, § 201(a), 28 U.S.C. §§ 152-53 (1982). *Compare* § 201(a) with 11 U.S.C. § 62 (1976) (repealed) (six year term held by bankruptcy referees).

17. Reform Act, § 201(a), 28 U.S.C. § 154 (1982).

18. 2 U.S.C. §§ 351-361 (1982).

19. Reform Act, § 241(a), 28 U.S.C. § 1471 (1982); *see also* S. Rep. No. 95-989, 95th Cong., 2d Sess. at 154, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5940 ("Except for municipal adjustments and railroad reorganization cases, the district judge will be expected to act in Title 11 cases only in limited instances (1) where it is necessary to enjoin a state or federal court or (2) to punish a person for contempt by imprisonment or by fine of more than \$1,000. Otherwise, the district judge will function only as an appellate judge in bankruptcy matters as provided in subsection (e) of this section.")

20. Reform Act, § 241(a), 28 U.S.C. § 1471 (1982) ("jurisdiction of all civil proceedings . . . arising in or related to cases under Title 11."). Under § 1471, the expanded jurisdiction of bankruptcy courts included elimination of the distinction between summary and plenary jurisdictions. *See supra* note 13; *see also* S. Rep. No. 95-989, 95th Cong., 2d Sess. at 153, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5939.

Actions that formerly had to be tried in the state court or the federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy court. The idea of possession and consent as basis for jurisdiction is eliminated. The adjunct bankruptcy courts will exercise in personam jurisdiction as well as in rem jurisdiction in order that they may handle everything that arises in a bankruptcy case.

Id.

21. Reform Act, § 241(a), 28 U.S.C. § 1481 (1982).

22. Reform Act, § 241(a), 28 U.S.C. § 1480 (1982).

tempt citations in certain situations,²⁴ and all process, orders, and judgments necessary to carry out the provisions of the Reform Act.²⁵

Article III, Section 1, of the Federal Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.²⁶

The establishment by Congress of bankruptcy courts with wide-ranging powers, but without the protections of Article III courts, raised the question of the constitutionality of the new bankruptcy courts under the Reform Act.²⁷

On March 8, 1979, Northern Pipeline Construction Company instituted a lawsuit against Marathon Pipe Line Company for claims arising out of a contract between the parties.²⁸ On January 14, 1980, Northern

23. Reform Act, § 250(a), 28 U.S.C. § 2256 (1982).

24. Reform Act, § 241(a), 28 U.S.C. § 1481 (1982).

25. Reform Act, § 101(a), 11 U.S.C. § 10(a) (1982).

26. U.S. CONST. art. III, § 1.

27. See, e.g., Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L. J. 297 (1981); Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560 (1980).

The legislative history of the Reform Act also indicates that the constitutionality of the exercise of broad judicial powers by judges lacking Article III guarantees of life tenure and undiminished salary was questioned during hearings on proposed bankruptcy legislation. *Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 2081-84 (1977) (testimony of William T. Plumb). The Subcommittee on Civil Constitutional Rights of the House Committee on the Judiciary, concluded that "the text of the Constitution and the case law indicate that . . . Congress should establish the proposed bankruptcy court under Article III, with all the protection that the Framers intended for an independent judiciary." SUBCOMMITTEE ON CIVIL CONSTITUTIONAL RIGHTS, HOUSE COMMITTEE ON THE JUDICIARY, 95TH CONG., 2D SESS., REPORT ON THE CONSTITUTIONAL BANKRUPTCY COURTS 33 (Comm. Print 3, 1977). The Department of Justice sent a letter and memorandum to the chairman of the House Committee on the Judiciary, stating that although the Department opposed the creation of independent Article III bankruptcy courts, it had concluded that "the proposed bankruptcy courts cannot be created as Article I courts." Letter with Appendix from Patricia M. Wald, Assistant Attorney General for Legislative Affairs to House Comm. on the Judiciary (July 14, 1977). The House subsequently passed a bill containing Article III safeguards, H.R. 8200, 95th Cong., 2d Sess., 124 CONG. REC. 1783-804 (1978), but the Senate passed its own bankruptcy bill, S. 2266, 95th Cong., 2d Sess., 124 CONG. REC. 28284, (1978), which eliminated the life tenure and guaranteed salary protections of the House bill. The Senate bill adopted the concept of an independent bankruptcy court as an adjunct to an Article III court. The adjunct concept was incorporated into the final bill as a result of last minute negotiations between managers of the bills in both houses. See 124 CONG. REC. 32393 (1978) (remarks of Rep. Don Edwards); Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941, 950-51, (1979).

28. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., No. C-79-01100-L(B),

filed a petition for reorganization²⁹ in the United States Bankruptcy Court for the District of Minnesota.³⁰ On March 25, 1980, Northern commenced an adversary proceeding³¹ against Marathon in which Northern alleged the same contract claims it had asserted in the original suit.³² The claims Northern sought to enforce were all governed by state law.³³

Marathon responded to this complaint by claiming that the bankruptcy court lacked jurisdiction³⁴ over the action for breach of contract because it involved an exercise of "the judicial Power of the United States"³⁵ which may be exercised only by tenured judges as provided by

(W.D. Ky. 1979). Northern sought to enforce claims for relief based on construction of several miles of petroleum pipeline in and around Louisville, Kentucky. Northern and Marathon entered a contract in October, 1977, under which Northern would construct the pipeline under Marathon's supervision. Northern's complaint asserted its own full performance, and alleged a variety of breaches by Marathon. Northern claimed damages totaling \$1,464,602.44. *See* Brief for Respondent at 5, Exhibit 1, at 7, *Marathon Pipeline Co. v. Northern Pipeline Constr. Co.*, 12 Bankr. 946 (D. Minn. 1981).

29. Northern filed a petition in bankruptcy pursuant to 11 U.S.C. § 301, (Supp. II 1978) 11 U.S.C. §§ 1101-46 (Supp. II 1978), and 11 U.S.C. app. Bankr. R. 11-3 (Supp. II 1978). A petition for reorganization, under chapter 11, allows a business debtor to file a plan with the court to discharge his debts without liquidating his business. *See* 11 U.S.C. §§ 1101-46 (Supp. II 1978).

30. *See Marathon Pipeline Co. v. Northern Pipeline Constr. Co.*, 12 Bankr. 946, 947 (D. Minn. 1981).

31. An adversary proceeding is a claim brought by a debtor or trustee in bankruptcy against a non-party on behalf of the estate in bankruptcy. *See* 11 U.S.C. app. Bankr. R. Part VII (1982).

32. *See Marathon Pipeline Co. v. Northern Pipeline Constr. Co.*, 12 Bankr. 946, 947 (D. Minn. 1981). Northern omitted a claim for relief based on an alleged mechanic's lien. *Id.* at 947 n.2.

33. *See* Brief of Appellees at 2, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ("Northern sought to enforce claims for monies allegedly due under written contracts and for changes and additional work on the pipeline and to recover damages for alleged breach of contract and warranty, misrepresentations and economic coercion and distress").

34. In addition to its constitutional claim, Marathon alleged that the Minnesota court lacked in personam jurisdiction over it under the "minimum contacts" doctrine of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Marathon is a Delaware corporation with its principal place of business in Findlay, Ohio. It does not do business in Minnesota and is not amenable to suit in Minnesota state or federal district court. *See* Brief of Appellees at 40, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Bankruptcy courts have held that they are not bound by the minimum contacts doctrine. *See, e.g., Nixon Mach. Co. v. Roy Energy, Inc.* (*In re Nixon Mach. Co.*), 15 Bankr. 131 (Bankr. E.D. Tenn. 1981); *Beasley v. Kelco Foods, Inc.* (*In re Trim-lean Meat Prod., Inc.*), 11 Bankr. 1010 (Bankr. D. Del. 1981); *Whippany Paper Bd. Co. v. Victory Container Corp.* (*In re Whippany Paper Bd. Co.*), 15 Bankr. 312 (Bankr. D.N.J. 1981); *Line By Dakota, Inc. v. Lebsack* (*In re The Line By Dakota, Inc.*), 8 Bankr. 643 (Bankr. D.S.D. 1981); *Scott v. Fort Ord Fed. Credit Union* (*In re G. Weeks Sec. Inc.*), 5 Bankr. 220, 225 (Bankr. W.D. Tenn. 1980).

35. U.S. CONST. art. III, § 1.

Article III of the Constitution.³⁶ The United States District Court for Minnesota held that "the delegation of authority in 28 U.S.C. § 1471 to the bankruptcy judges to try cases which are otherwise relegated under the Constitution to Article III judges . . . is an unconstitutional delegation of Article III judicial power to a nontenured Article I court."³⁷

On appeal to the United States Supreme Court, the plurality held, in a surprisingly broad opinion, that all jurisdiction of the bankruptcy courts, as constituted under the Reform Act, is void as a violation of Article III.³⁸ Although the Court could have narrowly struck down the bankruptcy court's jurisdiction to determine the type of claims presented in *Marathon*,³⁹ the Court held that the entire grant of jurisdiction under section 1471 is void. The Supreme Court applied its decision prospectively only,⁴⁰ and stayed the judgment to give Congress an opportunity to reconstitute the bankruptcy courts without impairing the interim administration of the bankruptcy laws.⁴¹

36. *Marathon*, 12 Bankr. at 947 (Bankruptcy court denied Marathon's motion to dismiss. Marathon appealed to the United States District Court for Minnesota).

37. *Id.* at 956.

38. *Marathon*, 458 U.S. at 87.

39. *Cf.* 458 U.S. at 87-92 (Rehnquist, J., concurring). Justice Rehnquist, joined by Justice O'Connor, disagreed with the plurality, regarding the scope of the issue presented to the Court, stating that "this Court should decide no more of a constitutional question than is absolutely necessary" *Id.* at 90. The concurrence would hold unconstitutional only as much of the Reform Act as confers jurisdiction on the bankruptcy court to hear and decide common law contract actions such as the *Marathon* case. Nevertheless, because the concurring justices agreed with the plurality that the unconstitutional provisions of the Reform Act are not readily severable from the remaining grant of authority to the bankruptcy courts, *see id.* at 87 n.40, they agreed with the plurality's judgment that all of § 1471 is unconstitutional. *Id.* at 91.

Chief Justice Burger, in his dissent, insisted that the Court's holding is limited to the proposition stated by Justice Rehnquist: that the Reform Act is unconstitutional only so far as it extends the jurisdiction of the bankruptcy court to cover common law contract actions. *Id.* at 92. The Chief Justice's position, however, ignored the plurality and concurring opinions' rationale which rejected the claim-by-claim approach to determining whether a matter falls within the jurisdiction of the bankruptcy court or an Article III court. *See Orenstein, Practice in the Bankruptcy Courts After the Decision in Northern Pipeline Construction Company — Adjusting to the New Jurisdiction Limits*, in SELECTED PROBLEMS AND PRACTICAL CONSIDERATION IN BANKRUPTCY PRACTICE—1982 186 (1982) (ADVANCED LEGAL EDUCATION SEMINAR OF HAMLINE UNIVERSITY).

40. 458 U.S. at 87 n.40 (the Court's judgment was immediately effective to bar the state law contract claim against Marathon).

41. *Id.* at 88 (initial stay of judgment was to October 4, 1982). On October 4, 1982, the Supreme Court extended the stay to December 24, 1982. 103 S. Ct. 199, 200 (1982). On December 24, 1982, the Supreme Court lifted the stay and final judgment was entered. 103 S. Ct. 662 (1983). As of this printing, Congress has not acted to reform the bankruptcy courts in accordance with this decision. *See infra* notes 166-81 and accompanying text.

II. ANALYSIS

A. *The Overbroad Grant of Jurisdiction of the Bankruptcy Reform Act*

The plurality⁴² based its decision to overrule the broad jurisdiction of non-Article III bankruptcy judges on the doctrine of separation of powers.⁴³ The Court looked to the intent of the framers of the Constitution for evidence of the purpose of the protections provided to federal judges by Article III.⁴⁴ The Court concluded that guarantees of life tenure and an undiminished salary were "incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government."⁴⁵

The Court also looked to its own decisions affirming the importance of the principles of separation of powers and an independent judiciary under the requirements of Article III. The Court noted instances in which it had previously upheld the protections of life tenure and irreducible compensation.⁴⁶ As recently as 1980, in *United States v. Will*,⁴⁷ the Supreme Court held that Congress is forbidden by the Compensation Clause⁴⁸ to repeal judicial salary increases after they have taken effect. In *Will*, the Court affirmed that "[a] Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other

42. Justice Brennan delivered the opinion in which Justices Marshall, Blackman, and Stevens joined. 458 U.S. at 52. Justice Rehnquist filed a concurring opinion, in which Justice O'Connor joined. *Id.* at 89. Chief Justice Burger filed a dissent. 458 U.S. at 92; *see supra* note 39. Justice White filed a dissent, in which Chief Justice Burger and Justice Powell joined. *Id.*; *see infra* notes 154-65 and accompanying text.

43. 458 U.S. at 57-60.

44. *Id.* at 57 (citing THE FEDERALIST No. 47, at 300 (J. Madison) (H. Lodge ed. 1888)). "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny." *Id.*; *see* 458 U.S. at 58 (citing THE FEDERALIST No. 78, at 489 (A. Hamilton) (H. Lodge ed. 1888) (Hamilton on the importance of an independent judiciary)); *see also* Krattenmaker, *supra* note 27, at 303.

[The] first section of Article III was intended to impose a specific limitation on the power of Congress and the Executive to create a federal judicial system. The framers intended that if Congress and the President wished to establish a federal judicial office, they first would have to guarantee members of that office independence from the other two branches.

Id.

45. 458 U.S. at 59; *see also* O'Donoghue v. United States, 289 U.S. 516, 531 (1931) (Article III protections foreshadowed in Declaration of Independence); THE FEDERALIST No. 79, at 491 (A. Hamilton) (H. Lodge ed. 1888) ("a power over a man's subsistence amounts to a power over his will.") (emphasis in original).

46. *Id.*

47. 449 U.S. 200 (1980).

48. U.S. CONST. art. III, § 1 ("The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.")

branches of government.”⁴⁹ In *Toth v. Quarles*,⁵⁰ the Supreme Court held that “the ‘good Behaviour’ Clause⁵¹ guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment.”⁵²

Based on its affirmation of the requirements of Article III, the Court concluded that there is no doubt that bankruptcy judges created by the Reform Act are not Article III judges.⁵³ The Court then determined that the bankruptcy courts do not fall into an established exception to the requirements of Article III, nor should any new exception be created for them, and therefore the grant of jurisdiction to the bankruptcy courts as established under the Reform Act is unconstitutional.⁵⁴ The exceptions to Article III considered by the Court were, first, the exception for legislative courts, and second, the exception for adjuncts to Article III courts.⁵⁵ The Court rejected arguments that the bankruptcy courts fit within either of these exceptions.

1. *The Bankruptcy Reform Act Courts are not Legislative Courts*

Article I of the Constitution provides that “Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court.”⁵⁶ Article I also authorizes Congress to enact laws on the subject of bankruptcies⁵⁷ and to adopt any related legislation that is “necessary and proper” to achieve its objectives.⁵⁸ Nevertheless, the legislative history of the Reform Act indicates that Congress chose not to create bankruptcy courts as Article I courts,⁵⁹ but rather as adjuncts⁶⁰ to the federal district

49. *United States v. Will*, 449 U.S. at 217-18.

50. 350 U.S. 11 (1955).

51. U.S. CONST. art. III, § 1 (“The Judges . . . shall hold their Offices during good Behavior . . .”).

52. 458 U.S. at 59 (citing *Toth v. Quarles*, 350 U.S. 11 at 16.)

53. 458 U.S. at 60. “The bankruptcy judges do not serve for life subject to their continued ‘good Behaviour.’ . . . Second, the salaries of the bankruptcy judges are not immune from diminution by Congress.” *Id.* at 60-61.

54. *Id.* at 87.

55. *Id.* at 63.

56. U.S. CONST. art I, § 8, cl. 9.

57. *Id.*, cl. 4. (authorizes Congress “To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”)

58. *Id.*, cl. 18. (authorizes Congress “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .”)

59. See *supra* note 27; contrary to its procedure in creating the United States Court of Military Appeals, 10 U.S.C. § 867 (1982), the United States Tax Court, 26 U.S.C. § 7441 (1982), and the two local District of Columbia Courts, D.C. CODE ANN. § 11-101(2) (1981), Congress did not specify that the bankruptcy courts were “established under Article I of the Constitution.” See also 458 U.S. at 63 n.13.

The Act designates the bankruptcy court in each district as an “adjunct” to the district court. 28 U.S.C. § 151(a) (1976 ed., Supp. IV). Neither House of Congress concluded that the bankruptcy courts should be established as independent legislative courts.

Id.

60. See *supra* note 14.

courts.⁶¹ Although Congress did not intend to establish the bankruptcy courts as legislative courts, the Supreme Court could have found the bankruptcy courts to be constitutionally valid if they had fit into an exception for Article I courts.⁶² The Supreme Court determined that the bankruptcy courts as constituted under the Reform Act, are not permissible legislative courts.⁶³

In only three narrow situations may Congress create legislative courts which are not subject to the requirements of Article III.⁶⁴ In each of those situations the "grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers."⁶⁵ Those three situations are territorial courts,⁶⁶ courts-martial,⁶⁷ and cases involving public rights.⁶⁸ The bankruptcy courts fit under none of those narrow situations.⁶⁹

a. *The Bankruptcy Courts are not Territorial Courts*

The concept of legislative courts derives from the opinion of Chief Justice Marshall in *American Insurance Co. v. 356 Bales of Cotton (Canter)*,⁷⁰ in which the Court held that the exercise of judicial power in the territories pursuant to Article IV⁷¹ does not constitute the exercise of "judicial power of the United States" as defined by Article III.⁷² The Court fol-

61. 28 U.S.C. § 151(a) (1982).

62. The government, as an appellant in this case, argued that Congress is empowered to establish legislative courts to adjudicate bankruptcy-related controversies, and that the bankruptcy courts as established under the Reform Act should be upheld as a valid exercise of that power. See *supra* Brief for the United States at 14-33, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

63. 458 U.S. at 73-76.

64. *Id.* at 64. Cf. *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (limited nature of "legislative court" doctrine).

65. 458 U.S. at 64.

66. *Id.*

67. *Id.* at 66.

68. *Id.* at 67.

69. *Id.* at 70.

70. 26 U.S. (1 Pet.) 511 (1828).

71. U.S. CONST. art. IV, § 3, cl. 2. ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

72. Territorial courts were:

created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested . . . is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states, in those Courts only which are established in pursuance of the third article of the Constitution; the same limitation does not extend to the territories. In

lowed the same reasoning when it reviewed Congress' creation of non-Article III courts in the District of Columbia.⁷³

The Court characterized the exception to Article III for territorial courts and courts within the District of Columbia as being limited to "certain geographical areas, in which no State operated as sovereign" ⁷⁴ Congress may exercise the general powers of government in these "geographical areas" because to do so creates no conflict with the principle of state sovereignty. Thus, the principle of federalism is not violated by an exception to Article III for territorial courts. Further, the Court seemed to rely on the concept of "exceptional powers bestowed on Congress by the Constitution"⁷⁵ as well as on a historical exception⁷⁶ to the requirement for Article III courts in the territories and the District of Columbia.

The reasons for allowing territorial courts to be constituted as legislative courts are not present in the case of bankruptcy courts. Because bankruptcy courts exercise jurisdiction over state court matters, such as the contract claim in the *Marathon* case, the threat to state sovereignty and a violation of the principle of federalism are present. Moreover, the Constitution has granted no exceptional powers to Congress and there has been no historical exception to the Article III requirements for bankruptcy courts, as for territorial courts.

b. The Bankruptcy Courts are not Courts-Martial

Like territorial courts, courts-martial involve a "constitutional grant of power that has been historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue."⁷⁷ In *Dynes v. Hoover*,⁷⁸ the Supreme Court stated:

Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining

legislating for them, Congress exercises the combined powers of the general, and of a state government.

26 U.S. (1 Pet.) 511, 546.

73. 458 U.S. at 65. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838), which notes that in the District of Columbia there is:

no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice.

37 U.S. (12 Pet.) at 618-19; see also *Palmore v. United States*, 411 U.S. 389 (1979).

74. 458 U.S. at 64.

75. *Id.* at 70.

76. *Id.*

77. *Id.* at 66.

78. 61 U.S. (20 How.) 65 (1858).

the judicial power of the United States; indeed, that the two powers are entirely independent of each other.⁷⁹

Despite this extraordinary grant of power to Congress for military courts, the Supreme Court has held unconstitutional attempts of military courts to bring within their jurisdiction matters properly within the realm of "judicial power" under Article III.⁸⁰

For the same reasons that bankruptcy courts do not fit the exception to Article III for territorial courts, they do not fit the exception for courts-martial. The jurisdiction granted to bankruptcy courts is far broader than that granted to military courts. Moreover, the broad grant of jurisdiction to the bankruptcy courts creates a threat to state sovereignty and the principles of federalism; considerations not present for military courts.

c. The Bankruptcy Courts are not within the Public Rights Doctrine

The public rights doctrine first appeared in *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁸¹ in 1855, where the Court stated:

matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.⁸²

The doctrine was developed in *Ex parte Bakelite Corp.*,⁸³ and *Williams v. United States*,⁸⁴ to mean a historically recognized distinction between matters that could be conclusively determined by the executive and legislative branches and matters that are "inherently . . . judicial."⁸⁵ None of the cases prior to *Marathon*, however, clearly articulated the public rights doctrine as the basis for establishing legislative courts or administrative agencies rather than Article III courts.

The public rights doctrine is based on the principle of sovereign immunity, which recognizes that the government may attach conditions to its consent to be sued,⁸⁶ and on the principle of separation of powers, which reserves certain prerogatives to the political, i.e., legislative and execu-

79. *Id.* at 79.

80. 458 U.S. at 66 n.17; see *Toth v. Quarles*, 350 U.S. 11, 15 (1955). *Toth* holds that expansion of court-martial jurisdiction over former servicemen after separation from the armed services encroaches on jurisdiction of Article III courts, where persons on trial are surrounded with more constitutional safeguards than in military tribunals. See also *Reid v. Covert*, 354 U.S. 1 (1957).

81. 59 U.S. (18 How.) 272 (1855).

82. *Id.* at 284.

83. 279 U.S. 438 (1929).

84. 289 U.S. 553 (1933).

85. 458 U.S. at 67 (citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)).

86. *Id.* at 67.

tive, branches of government.⁸⁷ The effect of the public rights doctrine, the Court concluded, is that only controversies which involve public rights may be removed from Article III courts and delegated to legislative courts or administrative agencies for determination.⁸⁸ Private rights, the Court stated, "lie at the core of the historically recognized judicial power."⁸⁹

Although the Court set out the purpose and effects of the public rights doctrine, the Court stated that the distinction between public and private rights has not been definitively explained in the precedents and that it was unnecessary to do so in the *Marathon* case.⁹⁰ The Court indicated only that a matter of public rights must, at a minimum, arise "between the government and others."⁹¹ In contrast, private rights are "the liability of one individual to another."⁹²

The Court's general discussion of the public rights doctrine provides little guidance to Congress in its attempt to restructure the Reform Act according to constitutional standards. Not only did the *Marathon* Court refuse to definitively distinguish between private and public rights, it also failed to discuss whether some matters before the bankruptcy courts are to be considered matters of public right and others matters of private right.

The Court's discussion of the public rights doctrine raises several questions which Congress must consider in determining whether establishment of any non-Article III bankruptcy court is constitutionally sound.⁹³ First, is the government a party to a bankruptcy proceeding or is the bankruptcy proceeding an adjudication of the liability of one individual to another? Second, is there a distinction between the rights to recover property of the estate⁹⁴ or to set aside preferences⁹⁵ and the right to re-

87. *Id.*

88. *Id.* at 70 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450, n.7 (1977); *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932); and *Katz, Federal Legislative Courts*, 43 HARV. L. REV. 894, 917-18 (1930)).

89. 458 U.S. at 70.

90. *Id.* at 69.

91. 458 U.S. at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 438, 451). *But see* 458 U.S. at 69 n.23.

[T]he presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing "private rights" from "public rights." And it is also clear that even with respect to matters that arguably fall within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts.

Id.; *see also* 458 U.S. at 70 n.24 (public rights doctrine does not extend to any criminal matters, although the government is a proper party).

92. 458 U.S. at 71-72 (quoting *Crowell v. Benson*, 285 U.S. 22 at 51 (1932)).

93. Orenstein, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, in *BANKRUPTCY II A-6-8* (Nov. 1982) (CLE Seminar, Iowa Chapter, Fed. B. Ass'n).

94. 11 U.S.C. app. Bankr. R. 604, 609 (1982) (prescribe procedure for recovery of estate property by trustee).

95. Under certain circumstances the government can recover property transferred by

cover money damages for the estate,⁹⁶ as in *Marathon*? The Court states that restructuring debtor-creditor relations under the Reform Act "may well be a 'public right,'"⁹⁷ but that the right to recover contract damages, as in the *Marathon* case, "obviously is not."⁹⁸ Is this distinction one which can properly be characterized as public rights versus private rights? The Court provided little guidance to Congress in answering these questions.

d. No Exception to Article III for a "Specialized" Legislative Court to Adjudicate Bankruptcy-Related Controversies

The Court rejected appellants' contention that Congress' authority to establish "uniform Laws on the subject of Bankruptcies"⁹⁹ carries with it an inherent power to establish legislative courts to adjudicate bankruptcy-related controversies.¹⁰⁰

Appellants, citing *Palmore v. United States*,¹⁰¹ argued that pursuant to its Article I powers, Congress may create non-Article III courts in specialized areas having particularized needs that warrant distinctive treatment.¹⁰² The Court rejected appellants' broad interpretation of *Palmore* on several grounds, the most compelling reason being that "appellants' analysis fails to provide any real protection against the erosion of Art. III jurisdiction by the unilateral action of the political Branches."¹⁰³ The Court also noted that although independent courts are not required for all federal adjudications, where Article III does apply, all legislative powers are subject to it.¹⁰⁴ The Court's reference in *Palmore* to "specialized areas having particularized needs"¹⁰⁵ referred only to geographical areas such as the District of Columbia and the territories.¹⁰⁶ It did not refer to

the debtor during a short period prior to the filing of a petition in bankruptcy. 11 U.S.C. § 547 (1982).

96. 11 U.S.C. app. Bankr. R. Part VII (1982).

97. 458 U.S. at 71.

98. *Id.*

99. U.S. CONST. art. I, § 8, cl. 4.

100. 458 U.S. at 72.

101. 411 U.S. 389 (1973), which stated:

[B]oth Congress and this Court have recognized that . . . the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."

Id. at 407-08.

102. 458 U.S. at 72-73.

103. 458 U.S. at 74. The "flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of 'specialized' legislative courts." *Id.* at 73.

104. *Id.* at 73.

105. 411 U.S. at 408.

106. 458 U.S. at 76. By this interpretation the *Marathon* Court reduces *Palmore* to a

specialized subject matter areas such as the administration of the laws of bankruptcy, where "laws of national applicability and affairs of national concern are at stake."¹⁰⁷ In areas of national concern and applicability, the Court held that "the Art. III command of an independent Judiciary must be honored."¹⁰⁸

In summary, the Court stated that "Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws."¹⁰⁹ Such legislative courts do not fall within any of the historically recognized exceptions to the Article III requirements, and there is not persuasive reason "in logic, history, or the Constitution" why the bankruptcy courts, as established under the Reform Act, "lie beyond the reach of Article III."¹¹⁰

2. *The Bankruptcy Courts are not Proper Adjuncts to the District Courts*

Congress attempted to establish the bankruptcy courts as adjuncts¹¹¹ to the United States district courts under section 1471,¹¹² the jurisdictional provision of the Reform Act. Appellants argued that delegation of certain adjudicative functions to the bankruptcy court, as provided by the Reform Act, is consistent with the principle and requirements of Article III.¹¹³ The *Marathon* Court stated that the test for constitutional

territorial case, over the vehement objection of Justice White, author of the *Palmore* opinion. See 458 U.S. at 114 (White, J., dissenting); see also *infra* notes 161-72 and accompanying text (discussion Justice White's dissent).

107. 458 U.S. at 76 (quoting *Palmore*, 411 U.S. at 408).

108. *Id.*

109. *Id.*

110. *Id.*

111. See S. Rep. No. 95-989, 95th Cong., 2d Sess. at 16-18 reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5802-04; Klee, *supra* note 27.

112. Reform Act § 241(a), 28 U.S.C. § 1471 (1982) states:

Jurisdiction.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

Id.

113. 458 U.S. at 76-77; Brief for United States at 11-13, 37-45, *Northern Pipeline*

delegation of authority to a non-Article III adjunct is whether "the essential attributes of the judicial power" are retained in an Article III court.¹¹⁴ The Court found that the Reform Act "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and . . . vested those attributes in a non-Art. III adjunct."¹¹⁵ Consequently, the Court held that Congress' grant of jurisdiction to the bankruptcy courts could not be "sustained as an exercise of Congress' power to create adjuncts to Art. III courts."¹¹⁶

The Court relied on two cases, *United States v. Raddatz*,¹¹⁷ and *Crowell v. Benson*,¹¹⁸ to conclude that the Reform Act does not meet standards governing the permissible assignment of adjudicative functions to a non-Article III court or agency. The Court extracted from these two cases two principles for determining the extent Congress may vest judicial functions in non-Article III officers. The principles are:

First . . . when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated — including the assignment to an adjunct of some functions historically performed by judges. . . . Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court.¹¹⁹

Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 51 (1982) (bankruptcy court is primarily a factfinder, analogous to a special master).

114. 458 U.S. at 77 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

115. 458 U.S. at 87; see also S. Rep. No. 95-989, 95th Cong., 2d Sess. 15-17, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5801-03 (Congress sought to create "functionally independent bankruptcy court").

Several characteristics of the bankruptcy courts were inconsistent with the adjunct concept and consistent with the concept of an independent court system, as originally developed by the House Judicial Committee. SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, HOUSE COMMITTEE ON THE JUDICIARY, 95TH CONG., 2D SESS., REPORT ON HEARINGS ON THE COURT ADMINISTRATIVE STRUCTURE FOR BANKRUPTCY CASES 33 (1978). Characteristics consistent with an independent court system include the following:

- 1) The bankruptcy court is a court of the United States under Reform Act § 213, 28 U.S.C. § 451 (1982) and a court of record under § 201(a), 28 U.S.C. § 151 (1982).
- 2) Unlike masters, magistrates, and other assistants, bankruptcy judges are judges of the United States and may be members of the Judicial Conference of the United States, see § 108, 28 U.S.C. § 331 (1982), and of the judicial conferences of the circuits, Reform Act § 210, 28 U.S.C. § 333 (1982).
- 3) Bankruptcy judges exercise all of the ordinary powers of the district court judges, including the power to preside over jury trials, § 241(a), 28 U.S.C. § 1480 (1982), issue declaratory judgments, § 249, 28 U.S.C. § 2201 (1982), issue writs of Habeas Corpus, § 250(a), 28 U.S.C. § 2256 (1982) issue contempt citations in certain situations, § 241(a), 28 U.S.C. § 1481 (1982), and issue all process, orders and judgments necessary to enforce the provisions of the Reform Act. § 101(a), 11 U.S.C. § 10(a) (1982).

116. *Marathon*, 458 U.S. at 87.

117. 447 U.S. 667 (1980).

118. 285 U.S. 22 (1932).

119. *Marathon*, 458 U.S. at 80-81.

The application of these principles remains obscure. The Court's discussion of *Raddatz*,¹²⁰ the more recent case,¹²¹ illuminates the requirements that an adjunct must meet to be constitutionally viable. The Court's discussion of *Crowell*,¹²² however, confuses rather than clarifies the issue.

In *Raddatz*, the Supreme Court, upholding the 1978 Federal Magistrates Act,¹²³ established two standards for the assignment of judicial functions to a non-Article III officer or adjunct. First, the final decision-making authority must remain in an Article III court¹²⁴ and second, the adjunct must be under the complete supervision and control of the Article III court.¹²⁵

Neither of the *Raddatz* standards are met by the bankruptcy courts established by the Reform Act. The requirement that final decision-making authority remain in the Article III court is inadequately met by a provision for Article III appellate review.¹²⁶ Moreover, under the Reform Act district court judges lack sufficient control over the bankruptcy judges. For instance, the Reform Act vests all jurisdiction for bank-

120. 447 U.S. 667 (1980).

121. Notably, *Raddatz* was decided after the Reform Act became law and might have influenced Congress in establishing the adjudicative structure of the bankruptcy court if it had been decided before the Reform Act was enacted. See Brief for Appellees at 32 n.10, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

122. 285 U.S. 22 (1932).

123. *Raddatz* specifically approved the provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (1976), which the *Raddatz* Court stated, "permits a district court to refer to a magistrate a motion to suppress evidence and authorizes the district court to determine and decide such motion based on the record developed before a magistrate, including the magistrate's proposed findings of fact and recommendations." 447 U.S. at 669.

124. 447 U.S. at 683.

Although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendation "such weight as [their] merit commands and sound discretion of the judge warrants," . . . that delegation does not violate Art. III so long as the ultimate decision is made by the district court.

Id. (citation omitted).

125. *E.g., id.* at 686. "[W]e confront a procedure under which Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities." *Id.*

126. Under the Reform Act, appeals were to be taken from the bankruptcy judge to a panel of three bankruptcy judges appointed by the chief judge of the respective circuit. Reform Act §§ 201(a), 241(a), 28 U.S.C. §§ 160, 1482 (1982). If no such appeals panel were designated, the district court was to exercise appellate jurisdiction. Reform Act § 238(a), 28 U.S.C. § 1334 (1982). If the appeal were decided by a panel, a second appeal from the panel to the circuit court of appeals would have been necessary to obtain Article III review. Reform Act § 236(a), 28 U.S.C. § 1293(a) (1982); see Note, *supra* note 27, at 592. "[B]ecause the threats to the separation of powers and judicial integrity envisioned by the Framers of article III flow largely from control of judges' subsistence and tenure, rather than from direct manipulation of the law, appellate review is an inadequate corrective." *Id.*

ruptcy-related matters in the bankruptcy judges.¹²⁷ In addition, the bankruptcy judges are to be appointed by the president with the advice and consent of the Senate.¹²⁸ Finally, the Reform Act contains no provisions for reference or withdrawal of cases.¹²⁹

In *Crowell v. Benson*,¹³⁰ the Court upheld the use of administrative agencies as adjuncts.¹³¹ The *Crowell* Court set forth the principle that when Congress creates rights it may determine the manner in which those rights will be adjudicated.¹³² Although the *Crowell* Court held that Congress has discretion to establish adjuncts to adjudicate congressionally created rights, it rejected the assumption that Congress could assign adjudication of constitutional rights to an adjunct.¹³³ Although *Crowell* allowed Congress broad power to determine the manner in which congressionally created rights will be adjudicated, the act reviewed by the *Crowell* Court gave the adjunct only limited power¹³⁴ in a limited cate-

127. Reform Act § 241(a), 28 U.S.C. § 1471(c) (1982). "The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts." *Id.*

128. *Cf. Raddatz*, 447 U.S. at 685 ("Magistrates are appointed by district judges, § 631(a), and subject to removal by them, § 631(h)."). Under the 1898 Act referees were appointed and removable by the district court. 11 U.S.C. § 62 (1976) (repealed); *see supra* note 13 and accompanying text.

129. *Cf. Raddatz*, 447 U.S. at 685 (Blackman J., concurring).

[T]he handling of suppression motions invariably remains completely in the control of the federal district court. The judge may initially decline to refer any matter to a magistrate. When a matter is referred, the judge may freely reject the magistrate's recommendation. He may rehear the evidence in whole or in part. He may call for additional findings or otherwise "recommit the matter to the magistrate with instructions." See 28 U.S.C. § 636(b)(1).

Id. The 1898 Act provided for automatic reference of bankruptcy cases to a referee, 11 U.S.C. § 45 (repealed 1976); 11 U.S.C. app. Bank R. 102(a) (repealed 1976), and for withdrawal of cases by the district court judge, at any time, for the convenience of the parties or for other cause. After withdrawal, the district court judge could hear the case himself or assign it to another referee in the district. 11 U.S.C. app. Bankr. R. 102(b) (repealed 1976).

130. 285 U.S. 22 (1932).

131. *Id.* In *Crowell*, the Court upheld the power of "the United States Employees' Compensation Commission, to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States." *Marathon*, 458 U.S. at 77.

132. *Crowell*, 285 U.S. at 54; *see Marathon*, 458 U.S. at 83.

[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.

Id.

133. *Crowell*, 285 U.S. at 60-61; *see Marathon*, 458 U.S. at 82.

134. *Crowell*, 285 U.S. at 54. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1927), allowed the deputy commissioner to determine questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made in accordance with the

gory of cases.¹³⁵

The essential principle that the *Marathon* Court derived from *Crowell* is that adjudication of constitutionally based rights must be reserved to Article III courts,¹³⁶ and the "essential attributes" of judicial power¹³⁷ must be retained by Article III courts even for congressionally created rights. The *Marathon* Court found that the distinction between congressionally created rights and other rights implicitly underlies the decisions in both *Crowell* and *Raddatz* and that such a distinction is required by the principle of separation of powers.¹³⁸

Although Congress' right to determine how a statutory right will be adjudicated is incidental to its power to define the right that it has created,¹³⁹ no comparable justification exists when the right is not of congressional creation.¹⁴⁰ Assignment of the adjudication of a constitutional right to an adjunct would create "substantial inroads into functions that have traditionally been performed by the Judiciary . . . [S]uch inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts."¹⁴¹

The *Marathon* Court held that the Reform Act "carries the possibility of such an unwarranted encroachment"¹⁴² because many of the rights subject to adjudication by the "adjunct" bankruptcy court are not congressionally created.¹⁴³ As a result, the Court concluded that Congress'

prescribed standards. The agency had no power to enforce its orders and every compensation order was subject to review in the district court. See also *Marathon*, 458 U.S. at 78, 85 (comparing the Longshoremen's Act with the Reform Act); *infra* note 143.

135. 285 U.S. at 38 (act deals exclusively with compensation for disability or death from injury on navigable waters of the United States and applies only when relation of master and servant exists).

136. 458 U.S. at 81-82.

137. See *supra* notes 114-19 and accompanying text.

138. 458 U.S. at 83.

139. See *supra* note 132 and accompanying text.

140. 458 U.S. at 83-84.

141. *Id.* at 84.

142. *Id.*

143. *Id.* at 84. "Indeed, the cases before us, which center upon appellant Northern's claim for damages for breach of contract and misrepresentation, involves a right created by state law. . . ." *Id.* (emphasis original).

The Court also contrasted the administrative scheme reviewed in *Crowell* with the Reform Act, which vests all "essential attributes" of the judicial power of the United States in the "adjunct" bankruptcy court:

First, the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or related to cases arising under title 11." 28 U.S.C. § 1471(b) (1976 ed., Supp. IV) (emphasis added). Second, while the agency in *Crowell* engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise "all of the jurisdiction" conferred by the Act on the district courts, § 1471(c) (emphasis added). Third, the agency in *Crowell* possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be

attempt to constitute the bankruptcy courts as adjuncts to the district courts under the Reform Act could not be sustained.¹⁴⁴

The Court's analysis of *Crowell* and its application to the Reform Act raises numerous questions.¹⁴⁵ The Court implies that the bankruptcy courts could be constitutionally established as adjuncts if they adjudicated only congressionally created rights. For Congress to reconstitute the bankruptcy courts along these lines, it must first determine how congressionally created rights are distinguished from constitutional rights. Since many federal laws are based on constitutional rights,¹⁴⁶ could suits involving these rights be tried before an adjunct, or must they be heard by an Article III judge?

Second, even if rights can be clearly categorized as either constitutional or congressionally created, where the latter are enforced between private parties, the attributes of judicial power must be retained by an Article III court.¹⁴⁷ Although rights created under the bankruptcy laws are congressionally based, some of the matters adjudicated under the bankruptcy laws involve disputes between private parties. Thus, non-Article III bankruptcy judges must be subject to the control and supervi-

enforced only by order of the district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, 28 U.S.C. § 1480 (1976 ed., Supp. IV), the power to issue declaratory judgments, § 2201, the power to issue writs of habeas corpus, § 2256, and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11, 11 U.S.C. § 105(a) (1976 ed. Supp. IV). Fourth, while orders issued by the agency in *Crowell* were to be set aside if "not supported by the evidence," the judgments of the bankruptcy courts are apparently subject to review only under the more deferential "clearly erroneous" standard. . . . Finally, the agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal.

Id. at 85-86 (footnotes omitted).

144. 458 U.S. at 86-87.

145. Orenstein, *supra* note 93.

146. *E.g.*, 42 U.S.C. § 1983 (1976) (providing a right of civil action for the deprivation of civil rights under color of state action).

147. In relying on *Crowell*, a case involving adjudication of private rights, the *Marathon* Court appears to have resurrected a case that was effectively overruled by *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977). The *Atlas Roofing* Court stated:

Our prior cases support administrative factfinding in *only* those situations involving "public rights," *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.

430 U.S. at 458 (emphasis added); *see also* 1 K. DAVIS, ADMINISTRATIVE LAW § 3:11, p. 188 (2d ed. 1978). Thus, based on the *Marathon* Court's discussion of the public rights doctrine and the Court's holding in *Atlas Roofing*, even a constitutionally established adjunct may only determine matters of public right, *Crowell* notwithstanding. Interview with James P. McCarthy, Attorney for Marathon, in Minneapolis (Mar. 8, 1983).

sion of the Article III court and the ultimate decision-making authority must be retained by an Article III court.

Third, the *Marathon* Court seemed to move from the *Crowell* distinction between congressionally created rights and constitutional rights¹⁴⁸ to its own distinction between congressionally created rights and state created rights.¹⁴⁹ Although the distinctions are analogous, the Court failed to analyze the differences between them and the effect those differences will have on an attempt by Congress to reconstitute the bankruptcy courts as constitutionally sound adjuncts. Congress possesses some flexibility in regard to constitutionally created rights, but it has no flexibility or power in regard to state created rights. The principle of separation of powers lies behind the distinction between congressionally created rights and constitutional rights.¹⁵⁰ The principles of federalism and state sovereignty lie behind the distinction between congressionally created rights and state created rights. How will these differences in underlying principles affect the manner in which Congress may establish viable adjunct bankruptcy courts?

Finally, the Court suggested no limits to the authority of adjuncts to adjudicate congressionally created bankruptcy laws. Significantly, the Court declined to endorse the constitutionality of the bankruptcy courts as they existed under the 1973 Bankruptcy Rules.¹⁵¹ Under the 1973 rules, which were in operation until the Reform Act took effect, bankruptcy referees exercised broad powers but remained subject to some controls by the district court.¹⁵² Since the Court declined to state

148. See *supra* notes 136-41 and accompanying text.

149. 458 U.S. at 84.

150. See *supra* note 138 and accompanying text.

151. 458 U.S. at 79 n.31. In regard to the powers exercised by the bankruptcy referees immediately before the Reform Act took effect the plurality stated: "[T]hose particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee, see 1 Collier [on Bankruptcy] ¶ 1.02 (15th ed. 1981)] have never been explicitly endorsed by this Court." *Id.*

152. We note, moreover, that the 1978 Act made at least three significant changes from the bankruptcy practice that immediately preceded it. First, of course, the jurisdiction of the bankruptcy courts was "substantially expanded" by the Act. H.R. Rep. No. 95-595, p. 13 (1977). Before the Act the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court. 11 U.S.C. § 46(b) (repealed). See *MacDonald v. Plymouth Trust Co.*, 286 U.S. 263, 266, (1932). It cannot be doubted that the new bankruptcy judges, unlike the referees, have jurisdiction far beyond that which can be even arguably characterized as merely incidental to the discharge in bankruptcy or a plan for reorganization. Second, the bankruptcy judges have broader powers than those exercised by the referees. See *infra*, at 84-85; H.R. Rep. No. 95-595, *supra*, p. 12, and nn.63-68. Finally, and perhaps most significantly, the relationship between the district court and the bankruptcy court was changed under the 1978 Act. Before the Act, bankruptcy referees were "subordinate adjuncts of the district courts." *Id.*, at 7. In contrast, the new bankruptcy courts are "independent of the United States district courts." *Ibid.*; Collier [on Bankruptcy,] ¶ 1.03, p. 1-9. Before the Act, bankruptcy referees were appointed and removable only by the district court. 11

whether the bankruptcy court under the 1973 rules would have passed constitutional muster, attempts to create an adjunct bankruptcy court could result in numerous trips to the Supreme Court before the limits are clearly defined and a new bankruptcy system can be conclusively established.

3. Summary

The *Marathon* plurality unequivocally held that the bankruptcy courts, as constituted under the Reform Act, are in violation of Article III and are therefore unconstitutional. In distinguishing the impermissible bankruptcy courts from constitutionally permissible legislative courts and adjuncts, however, the Supreme Court offered little guidance to Congress in reconstructing the bankruptcy courts as constitutionally viable non-Article III adjuncts.¹⁵³ The Court's discussion of public rights and of congressionally created rights raises more questions than it answers. A more thorough analysis particularly as applied to the specific work of the bankruptcy courts will be necessary to determine what limits must be placed on non-Article III bankruptcy courts for them to be constitutionally viable. Indeed, the Court's failure to define the limits of a non-Article III bankruptcy court appears to leave Congress with little alternative to reconstituting the bankruptcy courts as Article III courts.

B. Justice White's Dissent: A Balancing Test

Justice White, dissenting in an opinion¹⁵⁴ that relied heavily on his *Palmore v. United States*¹⁵⁵ analysis, asserted that Congress can create courts outside of the structure of Article III whenever it determines that there is a particularized need in a special area that warrants distinctive

U.S.C. § 62 (repealed). And the district court retained control over the reference by his power to withdraw the case from the referee. Bkrtcy. Rule 102. Thus even at the trial stage, the parties had access to an independent judicial officer. Although Congress could still lower the salary of referees, they were not dependent on the political branches of government for their appointment. To paraphrase JUSTICE BLACKMUN's observation in *Raddatz, supra*, the primary "danger of a 'threat' to the 'independence' of the [adjunct came] from within, rather than without, the judicial department." 447 U.S., at 685 (concurring opinion).

458 U.S. at 79 n.31.

153. Undoubtedly, the Court was reticent in providing guidelines for Congress because it was unwilling to take on the legislative task of reforming the bankruptcy laws. Perhaps this is why the Court struck down all jurisdiction under § 1471, although it could have decided the *Marathon* case by holding only § 1471(b) unconstitutional. In *Alabama Furniture Co. v. Still (In re Rivers)*, No. 81-0682 (Bankr. E.D. Tenn. 1981), cert. denied, 103 S. Ct. 764 (1983), the Court turned down an opportunity to clarify its decision in *Marathon*. Interview with James P. McCarthy, Attorney for Marathon, in Minneapolis (Mar. 8, 1983).

154. 458 U.S. at 92. Justice White was joined by Chief Justice Burger and Justice Powell in his dissent.

155. 411 U.S. 389 (1973); see 458 U.S. at 114-15.

treatment.¹⁵⁶ He proposed, in contrast to the limits prescribed by the plurality, a balancing test in which the burdens on Article III values are weighed against the values Congress hopes to serve when it creates an Article I court.¹⁵⁷

Justice White concluded that the bankruptcy courts, as established under the Reform Act, satisfied the standards of his balancing test. He determined that the non-Article III bankruptcy courts were constitutionally sound for the following reasons:

1. The availability of appellate review by an Article III court helps ensure proper separation of powers;¹⁵⁸
2. Bankruptcy matters are "of little interest to the political branches"¹⁵⁹ and thus there is little reason to fear that a legislative bankruptcy court will represent a dangerous accumulation of power in one of the political branches of government¹⁶⁰ or violate the principles of federalism; and
3. There is a compelling need to relieve the stresses on the old bankruptcy system.¹⁶¹

The plurality rejected Justice White's analysis because it provides no real limits and offers no protection against the "erosion of Art. III jurisdiction by the unilateral action of the political Branches."¹⁶² Although Justice White stated that he was not abandoning Article III,¹⁶³ that is

156. 458 U.S. at 114-15 (citing *Palmore v. United States*, 411 U.S. at 407-08).

157. Justice White states:

The inquiry should . . . focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.

458 U.S. at 115.

158. *Id.* at 115.

159. *Id.*

160. *Id.* at 116.

161. *Id.*

162. *Id.* at 74. The Court states:

JUSTICE WHITE's dissent suggests that Art. III "should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities," and that the Court retains the final word on how the balance is to be struck. *Post*, at 113-114. The dissent would find the Art. III "value" accommodated where appellate review to Art. III courts is provided and where the Art. I courts are "designed to deal with issues likely to be of little interest to the political branches." *Post*, at 115-116. But the dissent's view that appellate review is sufficient to satisfy either the command or the purpose of Art. III is incorrect. See n.39, *infra*. And the suggestion that we should consider whether the Art. I courts are designed to deal with issues likely to be of interest to the political Branches would undermine the validity of the adjudications performed by most of the administrative agencies, on which validity the dissent so heavily relies.

Id. at 74 n.28.

163. *Marathon*, 458 U.S. at 113. Justice White states that "Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be

exactly what he proposed.¹⁶⁴ Justice White was correct in stating that the Court has allowed vast power to be vested in Article I courts and administrative agencies, but he stretched the historical precedents too far¹⁶⁵ and in effect read Article III out of the Constitution.

C. *The Stay and the Aftermath*

The Supreme Court's decision to apply its ruling in *Marathon* prospectively and to stay the decision first to October 4, 1982,¹⁶⁶ and finally to December 24, 1982,¹⁶⁷ created confusion among the bankruptcy courts and federal district courts regarding the jurisdiction of the bankruptcy courts until Congress acts to reform the bankruptcy laws. Matters which had proceeded to final judgment or orders for which the appeal period had expired as of the date of the *Marathon* opinion are apparently res judicata.¹⁶⁸ Numerous questions and conflicting opinions have arisen, however, regarding the effect of the stay and the period until Congress acts on matters pending before the bankruptcy courts at the time of the *Marathon* decision and matters that have subsequently arisen.

Various courts have taken conflicting positions regarding the jurisdiction of the bankruptcy courts during the period of the stay. A West Virginia bankruptcy court¹⁶⁹ held that the bankruptcy judge could not exercise the powers of an Article III judge during the period of the stay.¹⁷⁰ The bankruptcy judge was, however, authorized and expected to exercise the powers granted under the Reform Act "which are not constitutionally infirm."¹⁷¹ In addition, the West Virginia court held that the

balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck." *Id.*

164. *Id.* Justice White states that:

There is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts. Unless we want to overrule a large number of our precedents upholding a variety of Art. I courts — not to speak of those Art. I courts that go by the contemporary name of "administrative agencies" — this conclusion is inevitable. It is too late to go back that far; *too late to return to the simplicity of the principle pronounced in Art. III* and defended so vigorously and persuasively by Hamilton in *The Federalist* Nos. 78-82.

Id. (emphasis added).

165. See 458 U.S. at 112. Justice White quotes *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582 (1949) for the assertion that "[W]e cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." *Id.* at 644. Justice White further states "Justice Harlan continued the process of intellectual repudiation begun by Chief Justice Vinson in *Tidewater*." 458 U.S. at 112.

166. 458 U.S. at 87-88.

167. 103 S. Ct. 199, 200 (1982).

168. 458 U.S. at 88.

169. *Armco, Inc. v. Cherry Pond Coal Co. (In re Cherry Pond Coal Co.)*, 21 Bankr. 588 (Bankr. S.D.W. Va. 1982).

170. *Id.* at 591.

171. *Id.*

bankruptcy court could exercise powers "similar in nature to powers of adjuncts"¹⁷² declared legitimate in *Crowell* and *Raddatz*.¹⁷³ A New Mexico bankruptcy court¹⁷⁴ took the contrary position that during the stay period the jurisdiction of the bankruptcy court, as intended by Congress, continued until the expiration of the stay.¹⁷⁵

During the time that the stay was in effect, the Supreme Court was given the opportunity to determine the effect of the *Marathon* decision if the stay expired before Congress took action. In *United States v. Security Industrial Bank*,¹⁷⁶ the appellee argued that all of the provisions of the Reform Act are unconstitutional and inoperative and therefore if the stay expired before Congress acted, the 1898 Act would be revived.¹⁷⁷ The Supreme Court refused to address this issue, stating that "because our decision in [*Marathon*] is prospective only, . . . and because we have stayed the issuance of our mandate in that case to December 24, 1982, . . . that decision does not affect the judgment in this case."¹⁷⁸

When the *Marathon* stay expired on December 24, 1982, the district courts adopted an interim emergency rule, drafted by the Judicial Conference of the United States to permit the continued adjudication of bankruptcy matters.¹⁷⁹ Like the stay, the emergency rule has created wide-spread confusion and disagreement. At least one court has held the

172. *Id.*

173. The *Armco* court stated that a description of the adjunct powers which the bankruptcy judges could exercise were unnecessary to its decision, but suggested a process to "minimize the impairment of bankruptcy administration while avoiding violence to Article III of the Constitution." 21 Bankr. at 591 & n.3.

174. *Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.)*, 21 Bankr. 645 (Bankr. D.N.M. 1982).

175. *Id.* at 647; see also *Weichenthal v. Rapperswill Corp. (In re Rapco Foam, Inc.)*, 22 Bankr. 637 (Bankr. W.D.N.Y. 1982) (where in controversies related to cases which are substantially completed, the court should exercise its jurisdiction to completion, otherwise court should refrain from exercising jurisdiction); *Schneider v. 2-Star Foods, Inc. (In re Cumberland Enter., Inc.)*, 22 Bankr. 626 (Bankr. M.D. Tenn. 1982) (*Marathon* stay allows bankruptcy court to exercise jurisdiction to full breadth of its authority during stay period); *Leasing Serv. Corp. v. Vaale (In re Cascade Oil Co.)*, 22 Bankr. 348 (Bankr. S.D.N.Y. 1982) (bankruptcy courts should not exercise jurisdiction where issues are not those traditionally reserved to the bankruptcy courts; stay not applicable to those cases where deflection of jurisdiction would not impair the administration of the bankruptcy courts); *Hassett v. Ganz (In re O.P.M. Leasing Serv., Inc.)*, 21 Bankr. 986 (Bankr. S.D.N.Y. 1982); Minnesota Bankr. Court, General Order in Bankruptcy (D. Minn. filed July 6, 1982) (suspending all discovery procedure and trial of adversary proceedings to recover judgment for money or property under bankruptcy law against litigant who is not the debtor or the trustee).

176. 103 S. Ct. 407 (1982).

177. *Id.* at 409-10.

178. *Id.* at 410 n.5 (citations omitted).

179. See, e.g., EMERGENCY RULE (D. Minn. Adopted Dec. 21, 1982). The emergency rule provides for reference of bankruptcy cases by the district court to the bankruptcy judges and withdrawal by the district court at any time. EMERGENCY RULE (c). The rule

rule to be unconstitutional.¹⁸⁰ Nevertheless, the Supreme Court has declined an opportunity to review the validity of the rule.¹⁸¹

III. CONCLUSION

The *Marathon* plurality's remarkable decision to hold unconstitutional all jurisdiction of the bankruptcy courts under the Reform Act is a powerful affirmation of the requirements of Article III. Assuming that the essential purpose of Article III, as expressed by the framers of the Constitution and earlier court decisions, is to protect the judiciary from political pressure,¹⁸² the question arises regarding whether that protection is necessary or even attainable in this day and age.

As Justice White correctly noted in his dissent,¹⁸³ vast judicial power has been vested in administrative agencies which are subject to the political will of Congress and the President. State court judges who are not subject to the requirements of Article III routinely make decisions that affect the lives of individuals far more profoundly than the contract claims presented in the *Marathon* case. Indeed, the claims presented in *Marathon* could have been decided by a state court judge who is periodically required to stand for election and who may be defeated for re-election on the basis of an unpopular decision.¹⁸⁴ Those same claims could

imposes certain limitations on the powers of bankruptcy judges. The bankruptcy judges may not conduct:

- (A) a proceeding to enjoin a court;
- (B) a proceeding to punish a criminal contempt —
 - (i) not committed in the bankruptcy judge's actual presence; or
 - (ii) warranting a punishment of imprisonment;
- (C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or
- (D) jury trials.

Id. at 2. Matters which may not be performed by a bankruptcy judge are transferred to a district court judge. EMERGENCY RULE (d)(1). In proceedings involving claims similar to those in the *Marathon* case, the bankruptcy judge may not enter judgment or a dispositive order, but must submit findings, conclusions, and a proposed judgment or order to the district court judge, unless the parties consent to the entry of judgment or order by the bankruptcy judge. EMERGENCY RULE (d)(3)(B). The rule provides for district court review of a final order or judgment of a bankruptcy judge. EMERGENCY RULE (e).

180. *See* *Color Craft Press, Ltd. v. Nationwide Shopper Sys.* (*In re Color Craft Press, Ltd.*), 27 Bankr. 392 (Bankr. D. Utah 1983) (rule is invalid insofar as it relies on jurisdiction under §§ 1471(a) and (b) since *Marathon* Court struck down all of § 1471); *Gillman v. Preston Family Inv. Co.* (*In re Richardson*), 27 Bankr. 407 (Bankr. D. Utah 1983) (based upon same views as those expressed in *Color Craft Press*). *But see* *Doctor v. Gleicher* (*In re Stillman*), 26 Bankr. 834 (Bankr. D. Md. 1983) (failure to carry out rule unanimously adopted by judges or appellate court would constitute judicial anarchy).

181. *In re Keene Corp.*, 103 S. Ct. 1237 (1983) (denying petition for writ of prohibition and/or mandamus).

182. *See supra* notes 42-52 and accompanying text.

183. 458 U.S. at 112.

184. *See* MINN. CONST. art. 6, § 7, which states: "The term of office of all judges shall

not be decided by a bankruptcy judge appointed by the President to a fourteen-year term.

Thus, if raw political influence is not the evil at which this decision is aimed, the Court's decision can only be understood as affirming the underlying principles of Article III—federalism and separation of powers. These principles require that when state court matters are decided in a federal court, they must be decided in an atmosphere free from the pressures of the political branches of the federal government. The relationship between the federal government and the states is still a vital issue and the *Marathon* decision is one attempt to define the parameters of that relationship.

be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law."